IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 445 OF 2004

(1)M/s. Timblo Minerals Private Limited
a Company incorporated under the Companies Act, 1956 (Act of 1956), having its registered Office at Kadar Manzil, Post Box No.34, Margao – 403 601 Goa.

(2) M/s. Timblo Private Limited
a Company incorporated under the Companies Act, 1956 (Act of 1956), having its registered Office at Kadar Manzil, Post Box No.34, Margao – 403 601 Goa. ..... Petitioners.

V/s.

(1)M/s. Hardesh Ores Private Limited,
a Company incorporated under the Companies Act, 1956 (Act of 1956), having its registered Office at Vila Flores da Silva, Erasmo Carvalho Street, Post Box No.31, Margao 403 601 Goa.

(2) M/s. Sociedade de Fomento Industrial Limited,
a Company incorporated under the Companies Act, 1956 (Act of 1956), having its registered Office at Vila Flores da Silva, Erasmo Carvalho Street, Post Box No.31, Margao 403 601 Goa.

(3)Shri Ramakant Rajaram Painguinkar,
major of age, resident of Shree Damodar Co-operative Housing Society, Building No.2, Flat No.1, Aquem, Margao, Goa 403 601. ..... Respondents.

Mr. S.D. Lotlikar, Sr. Advocate with Ms. Shreya Naik, Advocate for the petitioners.

Mr. B. Zaiwalla, Sr. Advocate with Mr. Sudesh Usgsaonkar Advocate for respondent No.1;

Mr. M.S. Usgaonkar, Sr. Advocates with Mr. Sanjay Sardesai, Advocate for respondent No. 2.

Mr. D. Pangam, Advocate for respondent No.3.

CORAM : B.H. MARLAPALLE, J.

DATE : OCTOBER 14, 2004.

ORAL ORDER :

Heard Mr. Lotlikar, the learned Senior Advocate with Ms. Shreya Naik, the leaned Advocate for the petitioners, Mr. Zaiwalla, the learned Senior Advocate with Mr. Sudesh Usgaonkar, the learned Advocate for respondent No.1, Mr. M.S. Usgaonkar, the learned Senior Advocate with Mr. Sanjay Sardesai, the learned Advocate for respondent No.2 and Mr. D. Pangam, Advocate for respondent No.3.

2. This petition, filed under Article 227 of the Constitution, arises from an interlocutory order passed on 27.9.2004, by the learned Civil Judge, Sr. Division, Quepem in Special Civil Suit No. 19/2003. Defendants No.1 and 2 had filed an application on 21.9.2004, praying before the Court not to allow Mr. Y.M. Bodhankar, an Advocate engaged by the plaintiffs to be examined as a witness and by the impugned order, this has been allowed.

3. Mr. Lotlikar submitted that merely because Mr. Bodhankar

was engaged as an Advocate, cannot be a reason to debar him as a witness of the plaintiffs and more particularly the plaintiffs were trying to examine the said witness on legal points which were material for formation of the plaintiffs' opinion before they entered into the contract. He placed reliance on the decision in the case of **Seth** Biradh **Mal and ors. vs. Sethani Prabhabhati Kunwar and ors,** (AIR 1939 Privy Council 152) and submitted that at the most, the trial Court could have called upon the witness or on its own advised the witness to withdraw from the case before he could step in the witness box.

4. The trial Court has granted the application filed by the defendants by referring to the provisions of Rule 13 of the Bar Council of Maharashtra and Goa and also by noting the fact that Mr. Bodhankar was engaged as an Advocate by the plaintiffs, in addition to some other Advocates and he was very much sitting in the Court below when other eight witnesses by the plaintiffs were examined. The Court below noted that Mr. Bodhankar had not withdrawn himself from the case before this application came up for arguments. The trial Court referred to the decisions of the Allahabad High Court in the case of **Lamani vs**. **Bejai Ram Chaudhari and anr.** (AIR 1934 Allahabad 840) and Andhra Pradesh High Court in the case of **Achyutana Pitchaiah Sarma vs. Gorantla Chinna Veerayya and ors. (**AIR 1961 AP 420).

5. Rule 13 of the Bar Council of Maharashtra and Goa, as framed under the Advocates Act, 1961, reads as under :

> “An Advocate should not accept a brief or appear in a case in which he has reason to believe that he will be a witness, and if being engaged in a case, it becomes apparent that he is a witness on a material question of fact, he should not continue to appear as an Advocate if he can retire without jeopardising his client's interest. “

The trial Court had recast the issues on 25.6.2004 and issue No. 5, in support of which Mr. Bodhankar was sought to be examined, reads as under :

> Whether the plaintiffs diligently believed that no other person had any rights in the mine and, therefore, bonafide entered into a contract with the defendant no.3 without notice of the rights of the defendant nos. 1 and 2 in respect of the mine ?

From the date the issues were recast till the plaintiffs presented the affidavit of Mr. Bodhankar on 21.9.2004, as many as eight witnesses were examined i.e. PW.1 to PW.8 and while they were in the witness box, Mr. Bodhankar was sitting in the Court hall. If the plaintiffs had any intention to place on record his affidavit and present him before the Court, as a witness for cross examination on the said affidavit, it was necessary for Mr. Bodhankar to withdraw from the case as soon as the issues were recast i.e. on 25.6.2004, in terms of Rule 13 as quoted hereinabove. This was not done.

6. Mr. Bodhankar continued to be one of the Advocates representing the plaintiffs when eight witnesses were examined on behalf of the plaintiffs. In the case of **Lalmani vs. Beji Ram Chaudhari and anr., (supra),** certain principles governing the conduct of an Advocate, an officer of the Court, were considered and it noted that the universal practice in the Courts in India is that witnesses should be called in one by one and that no witness who is to give evidence should be present when the deposition of a previous witness is being taken. This Court, in the case of **Oil and Natural Gas Commission vs. Offshore Enterprises Inc.,** (AIR 1993 Bombay 217), was also called upon to deal with the issue of the rights, privileges and obligations of Advocates. After discussing the scheme of Advocates Act, 1961, the Rules framed thereunder and the other literature placed before it, this Court, inter alia, observed thus :

> " On principle, the Advocate cannot act in dual capacity and cannot be a mixture of two characters. No express provision is required to be enacted in this behalf. With great respect, the implication from the scheme of the Code interpreted in the light of well recognised rights and obligation of the Bar is too obvious. It is unfortunate that the wrong illegal practice referred to in opening part of this order and the question formulated by the Court has continued so far.
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> 10. It is not sufficient that an Advocate acts impartially. It is also necessary that the Advocate must always appear to act impartially. The basic principle of acting impartially and mere representation of a client consistent with duty to opponent and Court keeping reasonable distance from arena of conflict would be jeoparidsed if the Advocate acts in professional and non-professional

> capacity both in the same matter and at the same time. Practices and procedures of the Court must serve the administration of justice and rule of law in keeping with its noble ideals, traditions and objectives. The Courts are required to interpret various provisions of various Acts and rules in manner so as to avoid anamolies so far as possible.

7. Issue No.5, in support of which Mr. Bodhankar was sought to be produced as an additional witness, was entirely a matter of opinion formation of the plaintiffs and that objective could have been achieved by placing on record the written opinion, if any submitted by Mr. Bodhankar, through the evidence of the concerned witness/ director of the plaintiffs Company to whom such an opinion was addressed. It was, even otherwise, not necessary for the plaintiffs to bring Mr. Bodhankar as a witness in support of the said issue when it came to only about his legal opinion.

8. The trial Court has rightly considered the application submitted by the defendants and it did not commit any error apparent on the face of the record to call for interference in the impugned order, under Article 227 of the Constitution. The petition is rejected summarily.

B.H. MARLAPALLE, J.

ssm.